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NO. 03149 APR 28 2004

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ALICE PAYNE,

Petitioner,

v.

JOHNNY LEE RILEY JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a claim of ineffective assistance of counsel under the Sixth Amendment, *Strickland v. Washington*, 466 U.S. 668 (1984) held that judicial scrutiny of counsel's performance must be highly deferential. Is counsel's decision not to call a witness at trial entitled to less deference when counsel does not personally interview the witness?

PARTIES

The Petitioner is Alice Payne, the Superintendent of the McNeil Island Corrections Center. The Respondent is Johnny Lee Riley, Jr.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Alice Payne, the Superintendent of the McNeil Island Corrections Center, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 352 F.3d 1313. App. 1a-27a. The court's order denying the petition for rehearing and rehearing en banc is unpublished. App. 28a. The report and recommendation of the United States Magistrate Judge and the order of the United States District Court for the Western District of Washington are unpublished. App. 30a-54a. The ruling denying review issued by the Commissioner of the Washington Supreme Court and the Washington Supreme Court's order denying the motion to modify the commissioner's ruling are unpublished. App. 55a-63a. The order of the Washington Court of Appeals dismissing respondent's personal restraint petition is unpublished. App. 64a-72a.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 2003. App. 1a. On January 30, 2004, the court of appeals issued an order denying a timely petition for rehearing and rehearing en banc. App. 28a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense".

STATEMENT

This case involves the claim that trial counsel provided ineffective assistance by not interviewing and calling a witness to corroborate respondent's claim of self-defense. To prevail in such a claim, the defendant must show that "counsel's representation fell below an objective standard of reasonableness" and that "the deficient performance prejudiced the defense". *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "Judicial scrutiny of counsel's performance must be highly deferential". *Id.* at 689. In this case, the Ninth Circuit was not highly deferential to counsel's performance. Rather, the court applied a rule that if a lawyer does not interview a witness, his decision not to put the witness on the stand "will be entitled to less deference than if he interviews the witness". App. 13a. The question presented in this case is whether there is an exception to the rule that judicial scrutiny of counsel's performance must be highly deferential.

Respondent Johnny Riley was convicted of assault for shooting Gustavo Jaramillo. On the day of the shooting, Jaramillo and Aaron Calloway possessed a stolen car and a stolen 9-mm semiautomatic pistol. Riley approached Jaramillo and asked about purchasing the car and the pistol. Then Riley left and when he returned a short time

later he was accompanied by Edward Pettis. Riley claimed that he shot Jaramillo in self-defense. He testified that he made some comments about Jaramillo's gang after which Jaramillo threatened to shoot him. Riley claimed that in response to this threat he pulled his gun and that when Jaramillo reached for his gun Riley shot him. Calloway and other witnesses testified that Jaramillo's hands were by his head and that he did not reach for his gun when Riley shot him. Pettis did not witness the shooting because he ran away before it occurred. The jury did not believe Riley's self-defense claim and convicted him. His conviction was affirmed on direct appeal. *State v. Riley*, 137 Wn.2d 904, 976 P.2d 624 (1999).

Riley filed a personal restraint petition in the Washington Court of Appeals challenging his conviction. Among his claims was that trial counsel was ineffective because he failed to interview and call Pettis as a witness. In an affidavit filed in support of Riley's petition, Pettis stated that he heard someone threaten to shoot Riley at which point he ran away. Pettis did not witness the shooting but he heard a shot and a few minutes later he saw Riley who said: "He tried to shoot me". The court dismissed Riley's petition because he did "not satisfy the *Strickland* prejudice prong". App. 69a-72a. The court reasoned that under Washington law a "defendant must show that aggressive or threatening behavior, gestures, or communication by the victim preceded the defendant's use of force". App. 70a. Riley's defense was based on his claim that "Jaramillo made a movement toward his gun". App. 71a. But Pettis's "testimony would only have corroborated Riley's assertion that he was

threatened". App. 71a. "Because Pettis ran away on hearing the threats, he was not present during the crucial moments immediately before Riley shot Jaramillo". App. 71a.

Riley sought review of the court of appeals' decision by the Washington Supreme Court. The court's commissioner denied review. App. 56a-63a. The commissioner recognized that "there is a strong presumption that counsel's representation was effective". App. 58a. For this reason the burden was on Riley to "show that there were no legitimate strategic or tactical reasons for counsel's challenged conduct". App. 58a. The commissioner concluded that Riley failed to "show that there was no legitimate tactical reason not to pursue Pettis as a witness". App. 58a. Pettis had a criminal record and initially mislead police about his knowledge of the incident. App. 58a. "Under the circumstances, counsel could have legitimately decided to concentrate on attacking the credibility of Jaramillo and Calloway, who themselves had criminal backgrounds". App. 58a. The commissioner also agreed with the court of appeals that Pettis "was not a witness to the critical events which ensued" so that there was "no reasonable probability that Pettis's testimony would have changed the outcome". App. 58a. Riley moved to have the Washington Supreme Court modify the commissioner's ruling. This motion was denied by the court. App. 55a.

Riley filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 in which he renewed his ineffective assistance claim. In considering this claim, the magistrate judge stated that there "is a strong presumption that counsel's performance fell within the wide range of reasonable assistance".

App. 45a. The judge also explained that under 28 U.S.C. § 2254(d)(1), Riley must establish that "the state court's adjudication of his constitutional claims 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'". App. 45a. The judge recommended denying Riley's ineffective assistance claim because "the state courts reasonably determined that [Riley] failed to meet the *Strickland* test". App. 47a. Because "Pettis ran away before the shooting occurred, he could have only verified that [Riley] was threatened. He had no way of knowing, other than by [Riley's] statements after the fact, whether [Riley] provoked the victim and caused the necessity to use self-defense". App. 58a. The district court adopted the report and recommendations of the magistrate judge and denied Riley's petition. App. 30a-31a.

Riley appealed this decision to the court of appeals, which reversed. The Ninth Circuit first concluded that trial counsel's "failure to interview Pettis rendered his performance below an objective standard of reasonableness". App. 14a. Since counsel did not personally interview Pettis, the Ninth Circuit's review of counsel's performance was not highly deferential. Rather, the court applied the following rule:

> "[W]here (as here) a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he interviews the witness". App. 13a.

The Ninth Circuit emphasized that the "government has provided no testimony of counsel as

to why he did not contact Pettis". App. 14a. In light of the government's failure to provide evidence about trial counsel's strategy, the court concluded that "the record shows that counsel did not make a reasonable professional judgment to ignore an important corroborating witness". App. 14a.

The Ninth Circuit also held that there was prejudice because "there is a reasonable probability that, but for [trial counsel's] failure to interview or call Pettis, the verdict would have been different". App. 19a. The court acknowledged that "Pettis could not testify whether Riley, with his gun pointed at Jaramillo, saw Jaramillo move as if to go for his gun, leading to a legitimate self-defense shooting". App. 15a. The court also recognized that a "verbal threat *alone* would not have justified Riley shooting Jaramillo". App. 16a n.5. Nevertheless, the court suggested that if "the jury thought Riley pulled his gun only in response to Jaramillo's threat to shoot Riley, then Riley's pointing a gun at Jaramillo might be understandable as a defensive action". App. 16a. The court also suggested that Pettis's testimony about the threat would have assisted Riley's credibility and "created more equilibrium in the evidence presented to the jury". App. 17a. Finally, the court said that Pettis's testimony about the threat to shoot Riley would have corroborated Riley's claim that he was not the first aggressor in the situation. App. 18a.

Having concluded that there was ineffective assistance of counsel, the Ninth Circuit turned to the standard of review required by 28 U.S.C. § 2254(1)(d). The court concluded that "the Washington court was purporting to apply *Strickland's* tests" so the decision was not "contrary

to the law that the Supreme Court of the United States established in *Strickland*". App. 21a. The court also found that there were "no unreasonable factual determinations in the Commissioner's opinion". App. 22a. However, the court did conclude that "there was an unreasonable application of *Strickland*" which was "objectively unreasonable". App. 23a. The court repeated its conclusion that Pettis's testimony might have assisted the determination of whether Riley was the first aggressor. The court also suggested that Riley's statement to Pettis—after the fact—that "he tried to shoot me" might have been admissible as an excited utterance. App. 23a. The court dismissed as speculative the Washington Supreme Court Commissioners reasoning that tactical reasons for not calling Pettis could have included his criminal record and the fact that he initially mislead police about his knowledge of the incident. App. 24a. Based on this conclusion, the Ninth Circuit reversed the district court.[1] The state filed a timely motion for rehearing and rehearing en banc, which was denied. App. 28a.

REASONS FOR GRANTING THE PETITION

There are two important reasons for granting the petition. First, the Ninth Circuit's "less deference" rule is in conflict with the decisions of this Court and the federal courts of appeal, which recognize that judicial review of trial counsel's performance must be

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[1] Ineffective assistance of counsel was not the only claim Riley raised in his petition for a writ of habeas corpus. Since the Ninth Circuit granted the ineffective assistance claim, it did not reach the other claims contained in Riley's petition. App. 27a. n.10.

highly deferential The Ninth Circuit's "less deference" rule is unique. Second, the impact of this rule is substantial. The less deference rule shifts the burden of proof from the petitioner to the government. It requires the government to prove why trial counsel made the decision not to interview and call a witness. Since the state is not privy to trial counsel's strategy, it is in a poor position to meet this burden.

1. The Ninth Circuit's "Less Deference" Rule Conflicts With The Decisions Of This Court And The Federal Courts Of Appeal

In this case Riley claims that trial counsel was ineffective because he did not interview or call Pettis as a witness. The Ninth Circuit applied its "less deference" rule. According to the court:

> "[W]here (as here) a lawyer does not put a witness on the stand, *his decision will be entitled to less deference* than if he interviews the witness". App. 13a (emphasis added).

The reason for this rule is the Ninth Circuit's view that "a lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor—factors we are not in a position to second-guess". App. 13a. This case does not represent an isolated application of the less deference rule. It is the law in the Ninth Circuit and has been applied in other cases. *See Lord v. Wood*, 184 F.3d 1083, 889-90 (9th Cir. 1999), *cert. denied* 528 U.S. 1198 (2000); *Alcala v. Woodford*, 334 F.3d 862, 889-90 (9th Cir. 2003).

The Ninth Circuit's less deference rule conflicts with the decisions of the Court, which require that judicial scrutiny of trial counsel's performance be highly deferential. In *Strickland*,

one of the defendant's claims was that trial counsel failed to investigate and call character witnesses. In evaluating this claim the court explained that "[j]udicial scrutiny of counsel's performance must be highly deferential". *Strickland*, 466 U.S. at 689. The reason for this deferential review is that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable". *Id.* Thus, "to eliminate the distorting effects of hindsight [] a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance". *Id.* The burden is on the defendant to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategic'". *Id.*

This Court in *Strickland* did not adopt a different rule when the claim was that trial counsel was ineffective because he or she failed to investigate or personally interview witnesses. The Court recognized that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary". *Id.* However, even when evaluating trial counsel's investigative decisions for reasonableness the Court requires "applying a heavy measure of deference to counsel's judgments".

There is nothing in *Strickland* or any of the Court's later decisions that suggests that trial counsel's decision not to interview or call a witness is entitled to less deference if the attorney does not personally interview the witness. For example, last year in *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), this Court held that trial counsel's decision not to expand

the investigation into the defendant's life history during the penalty phase of a capital case was ineffective. However, the Court assessed the reasonableness of the decision not to investigate "applying a heavy measure of deference to counsel's judgments". *Wiggins*, 123 S. Ct. at 2535.

The Ninth Circuit's less deference rule conflicts with decisions of federal courts of appeal. None of them has adopted a rule that trial counsel performance is entitled to less deference if he or she does not personally interview a witness that is not called to testify. All of these circuits apply a heavy measure of deference when considering a claim that trial counsel decision not to investigate was ineffective. *See Lema v. United States*, 987 F.2d 48, 54 (1st Cir. 1993) (claim that trial counsel neither interviewed nor presented potential defense witness) (the court "must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance"); *Maddox v. Lord*, 818 F.2d 1058, 1061 (2nd Cir. 1987) (same) ("there is a strong presumption that counsel's conduct was reasonable and that any challenged action might be considered sound trial strategy"); *Lewis v. Mazurkiewicz*, 915 F.2d 106, 113 (3rd Cir. 1990) (same) ("*Strickland* instructs we must apply a heavy measure of deference to counsel's judgments"); *Huffington v. Nuth*, 140 F.3d 572, 581 (4th Cir. 1998) (same) ("when evaluating a decision not to investigate further, we must regard counsel's choices with an eye for reasonableness in all the circumstances, apply a heavy measure of deference to counsel's judgments"); *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) (same) (the court "give great deference to counsel's assistance strongly

presuming that counsel has exercised reasonable professional judgment"); *Blackburn v. Foltz*, 828 F.2d 1177, 1180 (6th Cir. 1987) (same) ("court's scrutiny of counsel's performance must be highly deferential and must strongly presume that counsel's advocacy fell within the wide range of reasonable professional assistance"); *Sullivan v. Fairman*, 819 F.2d 1382, 1391 (7th Cir. 1987) (same) (in "reviewing counsel's decision not to investigate the court must apply a heavy measure of deference to counsel's judgments"); *Jones v. Jeffison*, 20 F.3d 849, 857 (8th Cir. 1994) (same) ("a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"); *United States v. Snyder*, 787 F.2d 1429, 1431 (10th Cir. 1986) (same) ("Judicial scrutiny of counsel's performance must be highly deferential"); *Chandler v. United States*, 218 F.3d 1305, 1318 (11th Cir. 2000) (same) (in "any ineffective assistance case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment").

The Ninth Circuit's "less deference" rule stands alone and there is no basis for it in this Court's decision. According to the Ninth Circuit the rational for the less deference rule is that "a lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor—*factors we are not in a position to second-guess*". App. 13a (emphasis added). The problem with this rational is that the reviewing court is never authorized to "second-guess" trial counsel's performance—whether or not counsel personally interview's a witness. Indeed, the reason that *Strickland* requires that judicial scrutiny must be

highly deferential is to prevent second-guessing by the reviewing court. *Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable".).

The Court should exercise its jurisdiction and bring the Ninth Circuit into conformance with its decisions and with those of the other courts of appeal.

2. The Impact Of the "Less Deference" Rule Is Substantial Because It Shifts The Burden From Petitioner To The Government

The Ninth Circuit's less deference rule is not simply a misstatement of the law with no practical consequences. It has the significant practical effect of shifting the burden of proof from the defendant to the government.

According to this Court, when a defendant claims that trial counsel's performance was ineffective, the burden is on the defendant. The "defendant must show that counsel's representation fell below an objective standard of reasonableness". *Strickland*, 466 U.S. at 688. The "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy". Both the Washington Supreme Court Commissioner and the district court recognized that the burden was on Riley to establish that trial counsel was ineffective.

App. 45a, 59a. In contrast, the Ninth Circuit put the burden on the government to prove that trial counsel's performance was not ineffective. App. 14a ("The government has provided no testimony of counsel as to whey he did not contact Pettis").

This shifting of the burden is significant for three reasons. First, it essentially allows the reviewing court to second guess trial counsel's performance. That is what the Ninth Circuit did in this case. Even though the court acknowledges that Pettis did not see the shooting and that a verbal threat alone would not have justified Riley's shooting Jaramillo, the court found trial counsel's performance was deficient and there was prejudice. The Ninth Circuit focuses on the fact that Pettis could testify about the threat to shoot Riley. The court ignores the fact that trial counsel, on cross examination of Calloway, confirmed most of Riley's testimony—that Riley commented about Jaramillo's gang; that the situation became tense because unfamiliarity with a gang was a sign of disrespect; and that such disrespect could lead to a violent confrontation. Trial counsel did this without having to deal with Pettis's criminal record or the fact that he initially mislead police about the incident. The Ninth Circuit's conclusion that Riley's statement "he tried to shoot me" would have been admitted in evidence as an excited utterance is nothing more than a decision—in hindsight—about a different way to try the case.

Shifting the burden of proof is also inconsistent with the standard of review in habeas corpus cases established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

28 U.S.C. § 2254(d) "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners". *Williams v. Taylor*, 529 U.S. 362, 399 (2000). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly". *Id.* at 411. The federal court may grant habeas relief only if the state court application of federal law was objectively unreasonable. *Id.* Here, the state court concluded that Riley did not meet his burden of overcoming the strong presumption that trial counsel's performance was effective. The Ninth Circuit reached the opposite conclusion because it applied the less deference rule and held that the government did not meet its burden. The Ninth Circuit says that the state court's conclusion is objectively unreasonable. But this conclusion rests on the Ninth Circuit's application of the less deference rule and the shifting of the burden of proof. If the Ninth Circuit applied the proper standard, it could not conclude that trial counsel's performance was objectively unreasonable.

The second problem with shifting the burden of proof is that the government is in a poor position to explain trial counsel's strategy. Of course, during the trial the government is not privy to defense counsel's strategy. In a later challenge based on ineffective assistance, trial counsel may or may not assist the government in explaining why he or she did certain things. At least one commentator has suggested that trial counsel has an ethical obligation to assist a former client is establishing that his performance was ineffective. David M. Siegel, *My*

Reputation or Your Liberty (Or Your Life): The Ethical Obligations of Criminal Defense Counsel in Post Conviction Proceedings, 23 J. Leg. Pro. 85 (1999). If trial counsel is actively assisting the defendant in establishing that his or her performance was ineffective, the government will have a very difficult time meeting this burden of proof. Of course, under *Strickland* there is nothing wrong with trial counsel assisting the defendant in a post-conviction proceeding because the burden is on the defendant to establish that trial counsel's performance was ineffective. It is only when the burden is shifted that this becomes a problem.

The third reason that the less deference rule—and the shifting burden—are important is that claims of ineffective assistance are common and the claim that trial counsel failed to interview a witness is easily made. Thus, the less deference rule has a significant impact. Ineffective assistance claims are the most frequently filed claims in both federal and state post conviction relief proceedings. Anne M. Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Columbia L. Rev. 1103, 1118 (1999). Moreover, claims that trial counsel failed to interview a witness after the fact are easily made. As the Eleventh Circuit observed in *Williams v. Head*, 185 F.3d 1223, 1236 (11th Cir. 1999), "it is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstances, had they been called". Under the Ninth Circuit's rule, if a defendant claims trial counsel did not interview a witness, counsel's decision is entitled to less deference and the

government has the burden of explaining why counsel did not interview and call the witness. Thus, the less deference rule will have a substantial impact on habeas corpus cases.

In light of the significance of the less deference rule, the Court should exercise its jurisdiction and bring the Ninth Circuit into conformance with the decision of this court and with those of the other courts of appeal.

CONCLUSION

For the reasons stated herein the petition should be granted.

RESPECTFULLY SUBMITTED,

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